Jany 18. 79 Sent to Supreme Court

8 Otto 486
Oct. 5. 1878.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 754.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CLARK W. THOMPSON, MORTON S. WILKINSON, HENRY M. RICE, AND GEORGE L. BECKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 3, 1878.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The United States of America, as plaintiff, and Clark W. Thompson, Morton S. Wilkinson, Henry M. Rice, and George L. Becker, defendants, a manifest error hath happened, to the great damage of the said United States of America, as is said, we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right, and according to the law and custom of the United States, ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of February, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 102nd.

[SEAL.] H. E. MUNN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

2 (Indorsed:) Supreme Court of the United States of America. The United States, plaintiff in error, vs. Clark W. Thompson, def't in error. Writ of error.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America within mentioned, in a certain schedule to this writ annexed, marked A, as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 29 day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and third year.

[SEAL.] H. E. MUNN,
Clerk U. S. Circuit Court, Dis't of Minnesota.

3 UNITED STATES OF AMERICA, *ss:*

To Clark W. Thompson, Morton S. Wilkinson, Henry M. Rice, and George L. Becker, greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday, being the fourteenth day, of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein the United States of America is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Renssellaer R. Nelson, a judge of the circuit court of the United States for the district of Minnesota, this 11th day of Fubruary, in the year of our Lord one thousand eight hundred and seventy-eight.

R. R. NELSON,
One of the Judges of the Circuit Court of the United States for the District of Minn.

4 DISTRICT OF MINNESOTA, *ss:*

W'm W. Billson, being duly sworn, says that in S't Paul, in the county of Ramsey & district of Minnesota, on the 15th day of February, A. D. 1878, he served the within citation on M. S. Wilkinson, att'y for def'ts in the case within mentioned, by exhibiting to him the original & handing to & leaving with him personally two copies thereof, one for the defendant Thompson & the other for the other of the said defendants.

W'M W. BILLSON.

Subscribed & sworn to before me this 15th day of Feb., 1878.
J. N. CARDOZA,
U. S. Commissioner, Dis't of Minn.

(Indorsed:) B. Law. 173. United States Supreme Court. The United States vs. Clark W. Thompson et al. Citation. Filed Feb. 16, 1878. H. E. Munn, cl'k. W'm W. Billson, U. S. attorney.

Personal service of the within citation by two copies thereof, viz, one copy for def't Thompson & one for other def'ts, admitted this 15th of Feb., 1878, at S't Paul, Minn.

M. A. WILKINSON,
By J. E. MILDAY,
Att'y for all Def'ts.

5 United States circuit court, district of Minnesota, eighth circuit.

THE UNITED STATES OF AMERICA, PL'FF,
vs.
CLARK W. THOMPSON, MORTON S. WILKINSON, Henry M. Rice, and George L. Becker, defendants.

The plaintiff, for its complaint, alleges that heretofore, to wit, on the 30th day of March, A. D. 1861, the defendants above named, with

others, because of and in consideration of the appointment of said Clark W. Thompson to the position hereinafter mentioned, executed, under their several hands and seals, and delivered to the plaintiff their certain joint and several bond and writing obligatory, a copy of which is hereto annexed and made a part of this complaint.

That the said defendant, Clark W. Thompson, had, prior to the execution of the above-mentioned bond (as in said bond is recited), been duly appointed by the President of the United States, by and with the advice and consent of the Senate, to be superintendent of Indian affairs in the State of Minnesota, and had accepted such appointment,
6 and was and continued to be such superintendent for a long time, to wit, for four years thereafter.

The plaintiff further alleges that the defendant, Clark W. Thompson, did not, after the execution and delivery of said bond and during his holding and remaining in said office under said appointment, carefully discharge the duties thereof; nor did he faithfully expend all public moneys; nor did he honestly account for the same, nor for all public property which after said date of said bond came into his hands as such superintendent without fraud or delay; nor did he during said time perform or keep any one of the conditions of said bond by him to be kept or performed; but that, on the contrary, there did, after the execution of said bond, during his holding said office under said appointment and prior to March 30th, A. D. 1865, come into his hands as such superintendent public moneys and public property of the plaintiff to the amount and value of ten thousand five hundred and sixty-two & $\frac{27}{100}$ dollars ($10,562.\frac{27}{100}$), no part of which did the said defendant, Clark W. Thompson, faithfully expend, and for no part of which has he ever honestly or otherwise accounted, but all of which he has unlawfully converted, appropriated, and retained for his own use.

7 That payment of said sum last mentioned was duly demanded of said defendant, Clark W. Thompson, on the said 30th day of March, A. D. 1865, but that the said defendant refused and still does refuse to pay or account for the same or any part thereof.

Wherefore, plaintiff demands judgment against the defendants and each of them for the said sum of $10,562.27, with interest thereon at the rate of six per cent. per annum, from March 30th, A. D. 1865, and for the costs and disbursements of this action.

Dated Dec. 6th, A. D. 1875.

W'M W. BILLSON,
U. S. Att'y for Minnesota.

Copy of bond made part of foregoing complaint.

Know all men by these presents that we, Clark W. Thompson, Morton S. Wilkinson, Cyrus Aldrich, Benjamin Pringle, Henry M. Rice, and George L. Becker, are held and firmly bound unto the United States of America in the sum of one hundred thousand dollars lawful money of the United States, to be paid to the said United States; for which payment well and truly to be made we bind ourselves and each of us, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the
8 thirtieth day of March, in the year of our Lord one thousand eight hundred and sixty-one.

The condition of this obligation is such that whereas the above-bounden Clark W. Thompson has been appointed by the President, by and with the advice and consent of the Senate, to be superintendent of

Indian affairs in Minnesota, and has accepted said appointment: Now, if the said Clark W. Thompson shall and doth at all times henceforth and during his holding and remaining in said office carefully discharge the duties thereof, and faithfully expend all public moneys and honestly account for the same, and for all public property which shall or may come into his hands, without fraud or delay, then the above obligation to be void; otherwise to remain in full force and virtue.

CLARK W. THOMPSON. [SEAL.]
MORTON S. WILKINSON. [SEAL.]
CYRUS ALDRICH. [SEAL.]
BENJAMIN PRINGLE. [SEAL.]
HENRY M. RICE. [SEAL.]
GEORGE L. BECKER. [SEAL.]

Sealed and delivered in presence of—
A. T. C. PIERSON.
CRAMER BUSH.

(Indorsed:) United States circuit c't, district of Minnesota. The United States, pl'ff, vs. Clark W. Thompson, def't. Complaint. Filed Dec. 6, 1875. H. E. Mann, clerk, by W'm A. Spencer, deputy. The summons form No. 1. W'm W. Billson, U. S. att'y.

9 *Summons.*

UNITED STATES OF AMERICA,
District of Minnesota, ss:

In the circuit court of the United States for the district of Minnesota.

THE UNITED STATES OF AMERICA
against
CLARK W. THOMPSON, MORTON S. WILKINSON, Henry M. Rice, and George L. Becker.

The President of the United States of America to the defendants above named, greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey and State of Minnesota, and file your answer in said clerk's office within twenty days after the service hereof, excluding the day of such service; and if you fail to answer the complaint as aforesaid the plaintiff will take judgment against you for the sum of ten thousand five hundred sixty-two $\frac{27}{100}$ dollars, with interest thereon at the rate of six per cent. per annum from March 30th, A. D. 1865, and for the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in said district of Minnesota, this 6th day of December, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence one hundred and year.

[SEAL.] H. E. MANN, *Clerk.*
W'M W. BILLSON,
Plaintiff's Attorney.

10 DISTRICT OF MINNESOTA, *ss:*

I hereby certify that I served the within summons on the within named Clark W. Thompson personally, by handing to and leaving with him a true copy hereof at Wells, in said district, the 18th day of December, 1875.

R. N. McLAREN,
U. S. Marshal,
By T. J. SHEEHAN,
Dep'ty.

DIST. OF MINNESOTA, *ss:*

I hereby certify that I served the within summons on the within named Geo. L. Becker personally, at S't Paul, in said dist., Dec. 9, 1875, and on Morton S. Wilkinson personally, at S't Paul, in said district, Dec. 13th, 1875, and on Henry M. Rice personally, at S't Paul, in said dist., Dec. 11, 1875, by handing to and leaving with each of them a true copy hereof.

R. N. McLAREN,
U. S. Marshal.

Fees, 26.50.

(Indorsed:) United States circuit court, district of Minnesota. No. . The United States of America, plaintiff, vs. Clark W. Thompson et al., defendants. Summons. Filed Dec. 28, 1875. H. E. Mann, clerk. W'm W. Billson, plaintiff's attorney.

11 United States circuit court, district of Minnesota.

THE UNITED STATES OF AMERICA, PL'FF,
vs.
CLARK W. THOMPSON, MORTON S. WILKINSON, Henry M. Rice, and George L. Becker, def'ts.

The defendants in this action, for answer to the complaint of the plaintiff, admit that on the day named in the said complaint they executed and delivered to the plaintiff the bond or writing obligatory as alleged in the said complaint.

Defendants further admit that prior to the execution of the said bond the defendant, Clark W. Thompson, had been duly appointed superintendent of Indian affairs in the State of Minnesota, and had accepted such appointment, and was and continued to be such superintendent as alleged in said complaint.

And these defendants, further answering, deny each and every allegation in the said complaint not hereintofore expressly admitted.

Dated April 28, 1876.

M. S. WILKINSON,
Att'y for Def'ts.

12 (Indorsed:) U. S. circuit court, district of Minnesota. The United States, pl'ff, vs. Clark W. Thompson et al., def'ts. Answer. Filed April 27, 1876. H. E. Mann, clerk. M. S. Wilkinson, att'y for def'ts.

United States circuit court, district of Minnesota, eighth circuit.

THE UNITED STATES OF AMERICA
against
CLARK W. THOMPSON, MORTON S. WILKINSON, Henry M. Rice, and George L. Becker.

1st defense.

The amended answer of the defendant, Clark W. Thompson, to the complaint of the plaintiff respectfully shows to the court and states that he admits that on the day named in the complaint he and the other defendants executed and delivered to the plaintiff the bond or writing obligatory as is alleged in said complaint.

Said defendant further admits that prior to the execution of the said bond he had been duly appointed superintendent of Indian affairs
13 in the State of Minnesota, and had accepted such appointment, and was and continued to be such superintendent as is alleged in said complaint.

And this defendant, further answering, denies each and every allegation in said complaint not hereinbefore expressly admitted.

2nd defense.

And, for a further answer and defense, this defendant says that the several supposed acts, doings, defaults, and omissions in said complaint mentioned and alleged, or either of them or any part thereof, were not done, performed, or suffered within ten years next preceding the commencement of this action, and the said alleged cause of action, or any part thereof, has not accrued to said plaintiff within ten years next preceding the commencement of this action.

M. S. WILKINSON,
Att'y for Def't.

(Indorsed): United States circuit court, dis't of Minnesota. The United States vs. Clark W. Thompson et als. Amended answer of def't Thompson. Filed Dec. 15, 1877. H. E. Mann, clerk. M. S. Wilkinson, att'y for def't.

14 United States of America, district of Minnesota, eighth circuit.

THE UNITED STATES OF AMERICA
against
CLARK W. THOMPSON, MORTON S. WILKINSON, Henry M. Rice, and George L. Becker.

1st defense.

The defendants, Morton S. Wilkinson, Henry M. Rice, and George L. Becker, for separate answer to the complaint in this action, respectfully show to the court and state:

That they admit that, on the day named in the complaint, they and the said Clark W. Thompson executed and delivered to the plaintiff the bond or writing obligatory as is alleged in the complaint.

These defendants further admit that, prior to the execution of the said bond, the said Clark W. Thompson had been duly appointed superintendent of Indian affairs in the State of Minnesota, and had accepted

such apppintment, and was and continued to be such superintendent, as is alleged in said complaint. And these defendants, further answering, deny each and every allegation in the said complaint not hereinbefore expressly admitted.

2nd defense.

15 And, for a further answer and defense, these defendants say that none of the said supposed acts, doings, and defaults, whereof the plaintiff, in his said complaint, has complained, were done, performed, or suffered within ten years next preceding the commencement of this action, and the said supposed cause of action did not, or any part of it, accrue to the said plaintiff within ten years next preceding the commencement of this action.

3rd defense.

And, for a further answer and defense, these defendants say: That by section 2092 of the Revised Statutes of the United States it was provided that the said superintendent of Indian affairs, the said Clark W. Thompson, should not have advanced to him, on Indian or public account, any money to be disbursed in future, until he had settled his accounts of the previous year, and had satisfactorily shown that all balances in favor of the government in his hands were ready to be paid over on the order of the Secretary of the Interior, and these defendants executed the said bond or writing obligatory with the understanding and upon the condition that the requirements of the said section of the said statute were to be obeyed and enforced by said plaintiff. But, nevertheless, the said plaintiff did not require and enforce obedience to

16 the requirements of the said section of said statutes; but, on the contrary, wholly disregarded and neglected the same. And all the said sums of money and other property referred to in said complaint, whereof it is therein alleged the said Thompson came into possession of, and of which it is alleged he did not faithfully expend or account for, as is in said complaint alleged, were unlawfully advanced to him, said Thompson, without first requiring him to settle his accounts as such superintendent for the previous year, as is in and by said statute required, and without the knowledge or consent of these defendants.

Therefore they pray judgment, &c.

M. S. WILKINSON,
Att'y for Def'ts.

(Indorsed:) U. S. circuit court, dist. of Minnesota. The United States vs. Clark W. Thompson et als. Answer of def'ts Wilkinson, Rice & Becker. Filed Dec. 15, 1877. H. E. Mann, clerk. M. S. Wilkinson, att'y for def'ts.

17 The United States circuit court for the district of Minnesota.

THE UNITED STATES OF AMERICA
vs.
CLARK W. THOMPSON ET AL.

And now comes the plaintiff aforesaid and demurs to the second defense of the separate answer of said defendant Thompson herein, and alleges as ground of said demurre's that the said second count of said separate answer does not state facts constituting a defense to the plaintiff 's complaint or any part thereof.

W'M W. BILLSON,
United States Attorney District of Minnesota.

(Indorsed:) U. S. circuit court, dist. of Minnesota. The United States vs. Clark W. Thompson et al. Demurrer to second count of separate answer of Clark W. Thompson. Filed Dec. 20, 1877. H. E. Mann, clerk. W'm W. Billson, U. S. att'y.

18 United States circuit court, district of Minnesota.

THE UNITED STATES
vs.
CLARK W. THOMPSON ET AL.

And now comes the plaintiff aforesaid and demurs to the second defense of the separate answer of the defendants, Morton S. Wilkinson, Henry M. Rice, and George L. Becker, and for ground of such demurrer alleges that said second defense of said separate answer does not state facts constituting a defense to the plaintiff's cause of action set forth in its complaint herein or to any part thereof.

W'M W. BILLSON,
U. S. Attorney District of Minnesota.

(Indorsed:) U. S. circuit court district of Minnesota. The United States vs. Clark W. Thompson, Morton S. Wilkinson, et al. Demurrer to 2nd count of separate answer of Morton S. Wilkinson et al. Filed Dec. 20, 1877. H. E. Mann, clerk. W'm W. Billson, U. S. att'y.

19 United States circuit court for the dist. of Minnesota.

Term minutes, December term, A. D. 1877, December 20, 1877. Present, Hon. John F. Dillon, Rensselaer R. Nelson, judges.

THE UNITED STATES
vs.
CLARK W. THOMPSON, MORTON S. WILKINSON, Henry M. Rice, & George L. Becker.

And now the demurrer of the plaintiff to the second defense set forth in the separate answer of the defendant Clark W. Thompson to the plaintiff's complaint, coming on to be heard, was argued by the counsel for the respective parties, and submitted to the court; whereupon it is by the court considered, ordered, and adjudged that the said demurrer be and the same is hereby overruled; that the plaintiff take nothing by its suit as against the said defendant, Clark W. Thompson, and that he go hence without day.

And the demurrer of the plaintiff to the second defense set forth in the joint answer of the defendants Morton S. Wilkinson, Henry M. Rice, and George L. Becker to the plaintiff's complaint, also coming on for hearing, was also argued by counsel and submitted; whereupon it is by the court considered, ordered, and adjudged that the said demurrer be, and it is hereby, overruled, and that the plaintiff take nothing by its suits as against the said defendants Morton S. Wilkinson, Henry
20 M. Rice, and George L. Becker, and that they go hence without day.

Judgment record signed this twentieth day of December, A. D. 1877.

H. E. MANN, *Clerk.*

20½ (Indorsed:) United States circuit court, district of Minnesota. The United States of America vs. Clark W. Thompson et al. Judgment roll. Filed December 20, 1877. H. E. Mann, clerk.

21 Supreme Court of the United States. Of October term, 1878.

THE UNITED STATES OF AMERICA
vs.
CLARK W. THOMPSON, MORTON S. WILKINSON, Henry M. Rice, and George L. Becker.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said United States of America by Wm. W. Billson, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that neither the second defence set forth in the separate answer of Clark W. Thompson to plaintiff's complaint, nor the second defence set forth in the joint answer of the other defendants above named, states facts constituting a defence to the plaintiff's complaint or any part thereof, and that the plaintiff's demurrers to said defences should both have been sustained and should not have been overruled, nor should judgment have been rendered herein in favor of said defendants or any of them, and the said United States of America prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment.

WM. W. BILLSON,
Attorney for Pl'ff in error.

(Indorsed:) B. 173. Law. Supreme Court of the United States. The United States vs. Clark W. Thompson et al. Assignment of errors. Filed February 6, 1878. H. E. Mann, clerk. Wm. W. Billson, U. S. attorney.

(Indorsed:) United States circuit court, district of Minnesota. United States vs. Clark W. Thompson. Return to writ of error.

(Indorsement on cover:) No. 754. The United States, plaintiff in error, vs. Clark W. Thompson, Morton S. Wilkinson, Henry M. Rice, and George L. Becker. Minnesota C. C. U. S. Filed 3rd September, 1878.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

THE UNITED STATES
v.
CLARK W. THOMPSON ET AL. } No. 754.

ERROR TO UNITED STATES CIRCUIT COURT FOR MINNESOTA.

PLAINTIFFS' BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

THE UNITED STATES
v.
CLARK W. THOMPSON ET AL. } No. 754.

ERROR TO UNITED STATES CIRCUIT COURT FOR MINNESOTA.

PLAINTIFFS' BRIEF.

STATEMENT.

Clark W. Thompson, prior to March 30, 1861, was appointed superintendent of Indian affairs in Minnesota, and on that day gave bond for the faithful performance of the duties of that office, and the honest accounting for all public moneys and property that might come into his hands officially, the other defendants becoming his sureties.

The present complaint, filed by the district attorney, in behalf of the United States, against these defendants, December 6, 1875, alleged that Thompson had not honestly accounted for all moneys coming into his hands as such officer, but that, on the 30th day of March, 1865,

there was found due from him $10,562.27, payment whereof was then demanded and refused; wherefore judgment was demanded for that sum, with interest after that date. (Record, 3, 4.)

For a second defense to this suit the defendants pleaded "that none of the supposed acts, doings, and defaults," &c., "were done, suffered, or performed within ten years," &c. (Record, 7.)

To this plea the plaintiffs demurred. The demurrer was overruled, and judgment entered for the defendants upon this plea. (Record, 8, bottom.)

ASSIGNMENT OF ERROR.

The United States assign for error the overruling of their demurrer to the defendants' second plea, and entry of judgment in favor of the defendants upon said plea (Record, 8, bottom), and say that the demurrer should have been sustained and the plea adjudged bad, in that the United States were not barred by the lapse of more than ten years between the demand of payment made March 30, 1865, and the filing of the complaint December 6, 1875, or between the date of said bond (March 30, 1861) and the 5th day of December, 1875.

BRIEF.

The well-known maxim of the common law is: "*Nullum tempus occurrit regi.*" (Lindsay *v.* Miller, 6 Peters, 673, top; United States *v.* Kirkpatrick, 9 Wheaton, 736; Gibson *v.* Choteau, 13 Wall., 99, top; Com. *v.* McGowan, 4 Bibb, 62; State *v.* Joiner, 23 Miss., 500; Parks *v.* State, 7 Mo., 194; State Treasurer *v.* Weeks, 4 Verm., 221; Levasser *v.* Washburn, 11 Grattan, 577; Com. *v.* Johnson, 6 Penn. St., 140.)

These cases are cited not merely in support of that maxim, but as instances showing how *explicitly* the intention to bind the sovereign must appear.

There is no Federal statute explicitly depriving the United States of the benefit of this maxim. On the contrary, as a general rule, it applies to suits by the government; but, as I understand the ruling of the court below, there is this exception, that in those States which permit themselves to be barred by the lapse of a specified time, the United States (without being expressly named) will be also barred by that lapse of time, under the judiciary act of 1789, c. 20, § 34 (1 Stats., 92), which declares "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." (Re-enacted in R. S., sec. 721.)

The statutes of Minnesota (ch. lxvi, tit. 11, § 6) provide that an action upon a contract, express or implied (unless it be founded upon some judgment or decree of a court), shall be barred if not commenced within six years

after the cause of action accrues. (2 Minn. Stats. at Large, 782.)

The twelfth section of that title further provides that "the limitations prescribed in this chapter for the commencement of actions shall apply to the same actions when brought in the name of the State, or in the name of any officer, or otherwise, for the benefit of the State, in the same manner as to actions brought by citizens." (*Id.*, 783.)

While a Territory, the following statute was in force in Minnesota. "The limitations prescribed in this chapter apply to actions brought in the name of the United States, in the same manner as to actions by private parties." (Rev. Sts. of 1851, c. 70, § 13, page 331; Revision of 1858, page 533, sec. xiii.)

This statute was first passed by the Wisconsin Territorial legislature, and was continued in force over that portion of it which, in 1848, became the Territory of Minnesota.

It was modified, several years after Minnesota became a State, to read as it now does.

Wisconsin legislation had undergone the same change after it became a State.

In the case of the United States *v.* Hoar, 2 Mason, 311 (A. D. 1821), Judge Story held that the thirty-fourth section of the judiciary act did not extend the effect of the statute of limitations of Massachusetts then in force (in which the State appears not to be named, though the same bar has there extended to the State as to individuals since the revision of 1836, if no earlier) to bar an action by the United States.

Citing this section 34, declaring the State laws rules of decision, he emphasizes by italics the last clause, "*in cases where they apply.*" "The whole stress of the argument, therefore, turns upon the question whether this is a case where the laws of the State do apply. Now, I think it may be laid down as a safe proposition that no statute of limitations has been held to apply to actions brought by the crown, unless there has been an *express* provision including it." (2 Mason, 312.) He then goes on to give the familiar statement that the king is not to be narrowed in his prerogative by any general statute, "unless the statute is made by *express* words to extend to him." (*Ib.*) Upon the next page he proceeds to give an additional reason: "But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the *legislative intention.* Where the government is not *expressly* or by *necessary* implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. * * * It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, *unless that construction be clear and indisputable upon the text of the act.*" (2 Mason, 314, 315; Levasser *v.* Washburn, 11 Grattan, 577, bottom.)

Judge Story's decision and that of People *v.* Gilbert (18 Johns., 228) are cited in the opinion in Gibson *v.* Choteau (13 Wall., 99, top), accompanied by language which seems to me decisive of the present case.

I.

The United States are not *expressly* mentioned (State *v.* Garland, 7 Ired. (law), 50, top; Com. *v.* Johnson, 6 Penn. St., 140). Before the admission of Minnesota as a State, the Territorial legislature passed an act in which actions by the United States founded on contract were barred in six years. Upon the erection of that Territory into a State, the State government, as to the administration of the larger portion of public affairs affecting the people, superseded that of the United States over the Territory. In revising legislation, to meet changed conditions, the words "United States" were dropped and "State" was substituted. Had it been the purpose to bar suits both by the State and national governments, these words would have been retained and the word "State" added; striking out these words signified that the United States was not within the bar. For years the statute read that such actions by the United States were barred; and now it is argued that the irresistible inference of legislative intent from this striking out of the "United States" and inserting the words "State or its officers," &c., is a purpose to continue the bar against the federal government!

II.

There is no inclusion of the United States by any *necessary* implication.

The reasons above given, and those hereinafter stated, with others that will, no doubt, suggest themselves to the court, rather repel than support any such inference as that the federal government was intended to be barred.

"Statutes which treat of persons or things of an inferior rank cannot by any general words be extended to those of a superior." (Hall *v.* Byrne, 1 Scam., 142, top; cited in Des Moines *v.* Harker, 34 Iowa, 86, as to a statute of limitations expressly barring "all bodies, corporate and politic," barring the State. Held, it did not.)

If general words will not bar, no bar should be created by an inference only arrived at by arguing from a supposed analogy, where no such words even as those above quoted are used.

The original reason for adopting this principle, that the sovereign is not bound by general legislation in which he is not named, applies to repel any inclusion by inference from the phraseology in which this statute is couched. (Savings Bank *v.* U. S., 19 Wall., 239, and cases cited.)

"The *nullum tempus* principle, as it has been called, is not derived from feudal or royal principles, as has been supposed. It has much stronger reasons for its support; *reasons peculiarly applicable to a republican form of government.*" (Harlock *v.* Jackson, 3 Brev., 254; to same effect, Levasser *v.* Washburn, 11 Grattan, 577.)

Gibson, C. J., says that so much of the prerogative as belonged to the king in the capacity of *parens patriæ*, or universal trustee, enters as much into our political compact as it does into the principles of the British constitution. Why should it not do so *peculiarly* where the maxim *salis populi* is the predominant principle of a government to whose operations and well-being the prerogative is as essential as to those of a monarchy? The necessity of it *in regard to statutes of limitation* is *peculiarly* apparent. The business of every government is

necessarily done by agents, chosen (in a republic) by the people, it is true, but still no more than agents, and chosen certainly with no greater attention to the qualification of vigilance than are the agents of an individual, whose utmost care in the choice of them is excited by the interest which he has directly in the event; and the frequency of miscarriage in any business managed even by these need not be pointed out. There is a perpetual tendency to relaxation where exertion is not invigorated by the stimulus of private gain; and this is the greater where the functions of the officer are to be performed, not under the supervision of an employer immediately concerned, but before the eys of those who have no other interest in the business than the remote stake they have in the public prosperity. To some extent, therefore, and in proportion to the want there happens to be of systematic accountability in the respective departments, remissness of its ministers will be found in every government; and it is a principle, not only of great practical value, but of the first necessity, that the legislature shall not be taken to have postponed a public right to that of an individual, unless such intent be manifested by *explicit* terms, or *at least* by *necessary* and IRRESISTIBLE implication." (Com. *v.* Baldwin, 1 Watts, 55; Com. *v.* McGowan, 4 Bibb, 62; Weatherhead *v.* Bledsoe, 2 Tenn., 352.)

This case of Com. *v.* Baldwin (1 Watts, 55) was affirmed in a suit against a surety upon an official bond (McKeehan *v.* Com., 3 Penn. St., 153), and in Com. *v.* Johnson (6 Penn. St., 140), where it was said "nothing short of language clearly and *explicitly* pointing to a legislative intent in conformity with the construction demanded by the defendants could justify our sanction of it. We look in

vain to the act of 1830* for language of this efficacy. To say the very least of the terms there employed, they are uncertain and ambiguous, if not inapt to express a meaning so important in its consequences upon the pecuniary interests of the community, not likely (as has been justly observed) to be jealously watched and enforced by agents uninvigorated by the stimulus of private gain." (6 Penn. St., 140; Levasser *v.* Washburn, 11 Grattan, 577.)

III.

Nor only does the original reason given for the existence of "the *nullum tempus* principle" apply to prevent a bar being raised against the United States by inferential construction, but there are other and cogent reasons why the legislature of Minnesota included the *State* but not the federal government.

First. Upon the ground that public conveniency and expediency required the bar should not operate against

*The proviso to the fourth section of the Pennsylvania statute approved March 28, 1803, declared that suits against the sureties, &c., of sheriffs and coroners, upon their official bonds, should not be sustained by any court of the commonwealth, "unless the same shall be instituted within five years after the date of such obligation." Dunlop's Dig. (3d ed., A. D. 1853), 215. On the 6th of April, 1830, the act construed in the case cited was approved, requiring prothonotaries, registers, and recorders to give bond with sureties for a faithful accounting and payment to the State treasurer for all fees, &c., in one-third of the amount fixed for sheriffs' bonds by the foregoing act of March 28, 1803; "and the effect, rights, and *remedies* of said bond shall be governed by the provisions of the said act of March 28, 1803." (*Id.*, 445, middle, § ix, last clause.) Such was the language held by Gibson, C. J., and his associates (in the case above cited from 6 Penn. St., 140) inefficacious to bar the commonwealth of its action, brought sixteen years after the date of the bond.

the United States, even if it did against the State. The contracts of the State were comparatively fewer; so far as they were official bonds, were for offices of brief tenure (to collect annual assessments, &c.), to which persons were elected by the people or legislature, and the duties were to be performed among and directly under the eyes of those from whom the money was collected, and it was paid out also (mainly) to persons in the State, and largely to those also holding responsible public positions. *It did not have a vast army of disbursing officers holding for life or for an indefinite term, paying out moneys they had not collected from taxation*, and paying it out to private soldiers and other such persons at points thousands of miles away from that at which the account was to be rendered and where the contract executed (Cox *v.* United States, 6 Peters, 203), perhaps in the trackless wilderness or amid the clash of arms, before the lips of the cannon had grown cold or the musket had been cleaned. The State of Minnesota had no such officials, made no such contracts, and was not legislating for such a condition of affairs. (United States *v.* Kirkpatrick, 9 Wheaton, 735.)

Nor were the State functionaries entitled to the same indulgence and delay in the settlement of their accounts as have, from these circumstances, been granted to the federal officials. Exposed, as a valuable prey, upon the frontier and among contending armies, an act of Congress gives them opportunity to prove before the Court of Claims that any loss they have suffered was without fault upon their part and should be allowed to them. Such a contingency may occur in the case of any federal disbursing officer. These claims are frequently made. If not sued, at least, the officer has six years to file the

petition seeking to establish his claim in the designated tribunal, proceeding by due process of law, taking testimony, arguing the cause, &c., there, and then, perhaps, coming here once or twice by appeal; and (if the construction against which we are now contending is adopted) in the mean time all action against him or his sureties may be barred. By attempting (it may be wrongfully) to obtain a release from the payment of part of the funds intrusted to him, the officer may be discharged from any liability to pay any part of it, or else he and his sureties must be sued before these questions as to the nature of a loss can be determined and a satisfactory adjustment of the account obtained, and thus unnecessary expense and trouble be incurred by all parties. (See United States *v.* Kirkpatrick, 9 Wheaton, 735, 736.)

Nor is the necessary system of settling accounts the same in the case of State as in that of United States officials. Inevitably, the computation and investigation of accounts, scrutiny of vouchers, &c., must take more time at the Treasury Department in Washington than at Minneapolis, and be confided, to a great extent, to clerks employed at small salaries and subject to incessant changes. The prolongation of the examination of an account is generally from a sincere desire to do justice, to grant indulgence (either from a natural complaisance or from the force of personal and political pressure), not to be hard and oppressive, and not from any real negligence or laches in the discharge of their duties by the accounting officers.

Second. It had, since the early days of the government, been considered ("upon a great public policy," 9 Wheat., 735) that laches could not be imputed to the

United States. (United States *v.* Kirkpatrick, 9 Wheaton, 735; United States *v.* Van Zandt, 11 Wheaton, 190; Dox *v.* Postmaster-General, 1 Peters, 324; Hart *v.* United States, 95 U. S., 318.)

The Minnesota legislature, then, while taking a different view of true policy for itself, might well feel delicacy and hesitation about any attempt to abrogate the rule, even within its own borders and courts, as to the United States; and, as matter of comity, leave it to Congress to decide upon an abandonment of a principle so long and firmly established, upon such grave reasons and by the weight of such authority.

That the amendment in Wisconsin was effected in the same way strengthens this view.

"It did not run against the United States *because it is a statute of policy*, referring to individuals merely, having for its object the repose of society. No laches are to be imputed to the government, *nor is it to be charged with disturbing the peace of society with suspicious or ill-founded claims.*" (Bledsoe *v.* Doe, 4 How. (Miss.), 24, top; Levasser *v.* Washburn, 11 Grattan, 577.)

Third. The fourth section of this Minnesota statute bars all *real* actions in twenty years. The language of the section to be construed will extend this bar to the possession of the public lands if applicable to the United States at all, and would apply to such lands in a great number of States, viz: California (since 1872), Massachusetts (since 1836), New York, Minnesota, Michigan, South Carolina, Georgia, Missouri, Mississippi, Wisconsin, and Vermont, if no others. The ill effects of such a construction are obvious, as is stated in Lindsey *v.* Miller (6 Peters, 673, top).

Fourth. Such legislation would be an attempt to circumscribe the prerogative of the supreme power. This is mentioned here as a reason for supposing such was not the legislative intent. The question of *power* will next be considered.

IV.

The statute is a bar interposed, by reason of laches, which is not to be imputed to the government. It is "*an attribute of sovereignty*" to be exempt from such an imputation and from the operation of such a statute, unless the sovereign has voluntarily consented to be bound thereby.

"On the ground of expediency and public convenience this was necessary; as an attribute of sovereignty, it was equally important to be preserved." (People *v.* Gilbert, 18 Johns., 229, top; Com. *v.* Baldwin, 1 Watts, 55, cited *ante;* Levasser *v.* Washburn, 11 Grattan, 577; Cincinnati *v.* First Presb. Church, 8 Ohio, 310, top; approved in Cincinnati *v.* Evans, 5 Ohio St., 594, and Pella *v.* Sholtze, 24 Iowa, 243, bottom; St. Chas. Co. *v.* Powell, 22 Mo., 525, 528.)

"The State contracts and sues by virtue of her sovereignty, and her right of action is not at all dependent upon statutes of limitation. * * * The true distinction is, that the State is not bound by ordinary legislation as to certain matters that she may do by virtue of her sovereignty; but wherever she is constrained to claim under a statute, she can take only upon the conditions and subject to the limitations imposed by law." (Josslyn *v.* Stone, 28 Miss., 758, bottom; Swearingen *v.* United States, 11 Gill & J., 377.)

It is for this reason that the principle does not extend to counties and municipalities. (22 Mo., 525, 528; 24 Iowa, 243.)

The power to contract is "incident to the general right of sovereignty"; "to adopt a different principle would be to deny the ordinary rights of sovereignty." (United States *v.* Tingey, 5 Peters, 128; United States *v.* Fisher, 2 Cranch, 396; Neilson *v.* Lagow, 12 Howard, 107, 108; United States *v.* Hodsdon, 10 Wall., 407; United States *v.* Maurice, 2 Brock., 109.)

The right to enforce performance of such contracts through the medium of its own courts must necessarily be incidental to the right to contract, and to sovereignty. Such a right, vested in the Federal Government, cannot be taken away or abridged by State legislation, and the presumption is against its being voluntarily relinquished.

"Laws are *prima facie* made for the government of the citizen and not of the State herself." (State *v.* Garland, 7 Ireedell's Law, 50, top.) If expressly extended to the State, the United States are not also to be drawn in by implication.

"AS LEGISLATION OF A STATE CAN ONLY APPLY TO PERSONS AND THINGS OVER WHICH THE STATE HAS JURISDICTION, THE UNITED STATES ARE ALSO NECESSARILY EXCLUDED FROM THE OPERATION OF SUCH STATUTES." (Gibson *v.* Choteau, 13 Wall., 99.) This decision was at the December term, 1871, in a cause coming up from Missouri, where the statute of limitations has been pleadable against the State since 1865.

The argument of our opponents is, as I understand it, substantially, this: that the statutes of limitation of a State are "rules of decision" in the Federal court (Mc-

Cluny *v.* Silliman, 3 Peters, 270, and other cases); that Minnesota bars her own sovereignty of the right to sue in her own courts in six years after the cause of action upon a contract accrues; *ergo*, that statute must be held to bar the United States, suing upon its contract, after the same lapse of time in its court within the State of Minnesota.

I deny the "*ergo*"; or that it is a fair deduction from the admitted premises, for the reasons hereinbefore suggested.

I also say that the State laws are "rules of decision" *only* "*in cases where they apply*," and that the present is not one of those cases. That Judge Story emphasized this qualification in United States *v.* Hoar (2 Mason, 311), has been already noticed.

A rule established by the State for government *only* of suits brought by herself, or by one individual against another, in her own courts, should not be applied to one brought by the United States in its own court. (Watson *v.* Tarpley, 18 Howard, 520; Savings Bank *v.* United States, 19 Wall., 239, and cases cited.)

So far as I can discover, the courts of Minnesota have never given the construction applied by the court below in this case to this statute.

V.

The intention of the lawmakers is the law.

What has been before suggested as reasons which should induce this court to give a particular construction to this statute is also offered as enabling us to understand the intent of the legislators in enacting it. I do

not believe the Minnesota legislature thought it was barring suits of the Federal Government in its own courts when the words "United States" were stricken out and the word "State" substituted.

VI.

It is a familiar principle that if these reasons, and such others as may suggest themselves, fail entirely to convince, but raise a doubt what the real intent of the legislators was, and as to the proper construction to be given to the law—all doubts should be resolved in favor of the sovereign. (Des Moines *v.* Harker, 34 Iowa, 86, bottom, citing Minturn *v.* Lane, 23 Howard, 435. See also Com. *v.* Johnson, 6 Penn. St., 140, cited *sup.*)

EDWIN B. SMITH,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

THE UNITED STATES
v.
CLARK W THOMPSON ET AL. } No. 754.

ERROR TO UNITED STATES CIRCUIT COURT FOR MINNESOTA.

DEFENDANTS' BRIEF.

M. S. WILKINSON and
H. F. MASTERSON,
Counsel for Defts.

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It is admitted that in the Federal Government and throughout the States where the common law has not been modified or repealed, it is generally understood that a statute of limitation does not bar the claims of a State, unless it is expressly designated, or "the mischiefs to be remedied are of such a nature that it must necessarily be included."

13 Wall, 99.

Nor is it denied that this rule applies with equal force in the prosecution of actions by the United States.

We do not therefore controvert the position taken by the counsel for the plaintiff on this point, nor is it necessary to notice the numerous decisions cited in his brief in support of this view.

The real question here is, not whether a statute of limitation bars a claim of a State, where *it* is *not* designated, but whether the statutes of limitations in a State which extend and apply to *actions brought by the State*, are "rules of decision" in the federal courts, where the United States is a party. We insist,

First, That the terms of the 34th section of the judiciary act of 1789, (R. S. sec. 721,) give the same efficiency to the State statutes of limitation in the federal courts, that they have *proprio vigore* in the State courts.

Second, That the statutes of limitation of the State of Minnesota have by their own force efficiency in the *State* courts to bar *all* plaintiffs, including the sovereign, and, therefore, this statute has efficiency to bind and bar all plaintiffs, including the sovereign, in the *federal* courts sitting within that State.

The above propositions are adopted from the opinion of Mr. Justice Story in the case of the United States vs. Hoar, 2nd Mason, 312–18, an authority strangely relied on by the learned counsel for the plaintiff in this case.

But we submit that if the learned Judge did not mis-state the law in that case, the judgment of the court below in this case must be affirmed.

Judge Story, in the case above cited, after quoting the 34 section of the judiciary act of 1789, says: "The whole stress of the argument, therefore, turns upon the question, whether this is a case where the laws of the State do apply," page 312.

After showing that statutes of limitation do not apply to the sovereign unless he be named, he says:

"We find accordingly in our own State (Mass.) the "doctrine is well settled that no laches can be imputed "to the government, and against it no time runs so as "to bar its rights. So that it is clear *that the statute of "limitations pleaded in this case would be no bar to a "suit brought to enforce any right of the State in its own "courts.*" Ib., page 314.

This is the *reason* of the decision and, therefore, the *life* of it. And it must be inferred that had not that reason existed (and which does not exist in this case) the judgment of the court would have been the reverse.

The conclusion cannot be avoided, that if the State of Massachusetts had, like the State of Minnesota, designated the sovereign State in its statute of limitation, and provided that it should apply equally to the sovereign and citizen, the court would have held the plea good against the United States under the provisions of the judiciary act.

But again on page 315 of the same report, speaking of the terms of the judiciary act of 1789, the court states the law exactly as we claim it to be—namely:

"It is most manifest that the terms give the same "efficacy and none other, to the statutes *in the federal* "that they have *proprio vigore* in the State courts."

Now it is indisputable and undisputed, that the

statute of limitations of Minnesota does by its express terms apply to and bar the State in her own courts, in the same manner and to the same extent that the statute applies to and bars a private citizen.

See Plaintiff's Brief, page 4.

We do not contend here, as the defendant did in the case above cited, for a construction of the judiciary act "which should *include* the United States *at the* "*same time that it excluded the State.*"

In the case of M'Cluny vs. Silliman, 3d Peters, the court says: "It is a well settled principle that a statute "of limitation is the law of the forum and operates "upon all who submit to its jurisdiction."

After citing the 34th section of the judiciary act the court says: "Under this statute, the acts of limitation of "the several States, where no special provision has been "made by Congress, form a rule of decision in the "courts of the United States; *and the same effect is* "*given to them as is given in the State Courts.*"

3 Peters, 276.

And on page 278, it is declared that statutes of limitations are more favorably construed than formerly.

In the Circuit Court of the United State for the District of Minnesota at the June Term, 1877, Mr. Justice Miller presiding, it was decided in the case of the United States vs. Rice, Fridley *et al., that the State statute of limitations did apply to and govern actions wherein the United States was a party.*

This was an application for leave to issue execution against the above named defendants, against whom a judgment had been obtained in favor of the United

States, as sureties upon an official bond, more than ten years before the date of the application. This motion was resisted upon the ground that more than ten years had expired since the rendition of the judgment; and that by the statute of limitations of the State of Minnesota, "all actions upon a judgment or decree of a court of the United States, or of any State or Territory of the United States," were barred after ten years after the rendition of the judgment.

In that case the court held that the statute of limitations of the State did apply to and *bind the United States*, as well as the State of Minnesota and the private citizen.

We do not deny the right of Congress to make special provisions as to the limitation of actions in the federal courts.

Nor can it be denied that instead of making such provisions Congress may, in its discretion, require the federal courts to be governed in this regard by the statutes of the States where the courts are held, and in such case the statute of the State has all the force of an act of Congress on that subject.

The 34th section of the judiciary act does (as we have shown) in effect adopt the statutes of the several States upon the subject of the limitations of actions, and declares them to be "rules of decision" in the federal courts—in all cases where Congress does not otherwise provide.

The doctrine of "prerogative" and—"no time runs against the king," upon which so much stress is laid by counsel. has no existence in this country except by force of the common law brought by our ancestors from England.

It has no existence except where it has been expressly or by implication adopted. And like any other doctrine of the common law, may be abrogated or modified by appropriate legislation.

This doctrine of the common law has never been in force in Minnesota. It was as clearly abrogated and repealed, as if the legislature had enacted that so much of the common law as provides that statutes of limitations shall not apply to and bind the sovereign unless he be named in such statutes, is hereby repealed. The brief of the learned counsel for the plaintiff (page 4) shows that it has been rejected from the beginning and the opposite doctrine adopted by appropriate statutory enactment.

We quote from his brief: "While a territory the fol-"lowing statute was in force in Minnesota. The limita-"tions prescribed in this chapter apply to actions "brought in the name of the *United States* in the same "manner as to actions by private parties."

And he truly adds: "This statute was first passed "by the Wisconsin Territorial Legislature, and was "continued in force over that portion of it which in "1848 (1849) became the Territory of Minnesota." See plffs' brief, page 4.

That is to say, there has never been a time since it became possible to institute a suit in Minnesota, when by the express words of the statute of limitations, it did not apply to actions brought by the government to the same extent that it applied to private parties.

These territorial statutes had within the territories

the *force of acts of Congress, because* the legislative power of the territories was delegated to them *by* Congress. And all laws passed by the territorial legislature were required to be submitted to Congress, and if not disapproved were to be in force and effect.

Organic act of Wisconsin, sec. 6, 5 Stat. at large, page 12.

Organic act Minnesota, sec. 6, 9 Stat. at large, page 405.

The above cited statutes of limitations were not disapproved by Congress. And afterwards Minnesota was admitted into the Union with a constitution which continued those statutes with others in force until repealed.

Con. of Minnesota, sec. 2 of schedule.

These territorial laws are not within the provisions of the 34 sec. of the judiciary act, but they rest on the power of Congress to make laws for the government of the territories either by *direct* legislation or by its creatures acting *by its authority, and receiving its approval.*

But the learned counsel for the plaintiff, in his brief, page 6 and again in page 16, makes a point on the fact that after Minnesota became a State in the revision of her statutes (in 1866) the words "United States" were dropped and "State" was substituted, and he says, "had it been the purpose to bar suits both by the State "and national governments, these words would have "been retained and the word 'State' added."

It seems to us that the answer to this is obvious. The statutes of the territory were, as we have shown,

enacted in the exercise of a jurisdiction *federal* in its character, and in the territories they had the *effect* of acts of Congress. But, as is clearly shown by Judge Story in the case above cited, the statutes of the State were operative in the federal courts *only* because Congress had enacted that they should be. They are followed as rules of decision in the federal courts, not because the State made them, *but because Congress adopted them.*

The State legislature had in its sphere no more right to say its statutes *should* be a rule of decision in the federal courts than it had to say *they should not be.* This is a question that is exclusively within the power of Congress.

The counsel for the plaintiff, in citing the case of Gibson vs. Choteau, 13 Wall., says, "this decision was "at the December term, 1871, in a cause coming up "from Missouri, where the statute of limitations has "been pleadable against the State since 1865.

If the learned counsel means by this that at the time that action was commenced, or when the cause of action accrued, that the statute of limitations applied to the State of Missouri as well as to the citizen, he has fallen into an error of fact. The statutes of Missouri referred to by him did not go into effect until August 1st, 1866; and did not apply to any case commenced before that date, nor in which the cause of action accrued before that date; while the case of Gibson vs. Choteau was commenced in the St. Louis Land court, and there tried prior to March 21st, 1866. So that the statute referred to could have no bearing on it whatever.

Genl. Statutes Missouri, chap. 191, sec. 32 and 33, chap. 224, sec. 2.
Gibson vs. Choteau, 39 Mo., 543.

On page 12 of his brief, counsel, referring to the 4th section of the Minnesota statute, says: "the language "of the section to be construed will extend this bar to "the possession of the public lands if applicable to "the United States at all," &c. Our answer is—

First.—The judiciary act says: "The laws of the State, *except where the constitution, treaties or statutes of the United States otherwise require,*" &c. This *exception* covers the case of the public domain, as is well shown by the opinion of this court, in *Gibson* vs. *Choteau.*

It will be noted, the exceptions in the judiciary act are the constitution, treaties and statutes of the United States, and nothing more. *It does not except the common law or any doctrine of it.* And therefore if the law of the State abrogates any common law doctrine, the same is by force of the act of Congress abrogated in the federal courts.

Second.—It is impossible for any one to acquire and hold peaceable possession of the public domain, or any part of it, for twenty years adversely to the United States, *under color of title;* for the title of the United States is constituted by the constitution, treaties and statutes, *which all persons are charged with knowledge of.* Everybody is bound to take notice of all their provisions. Limitations do not run in favor of a trespasser *who knows* the title to be in another. "Color

of title" means apparent or *prima facie* right. See 9 Wend, 511; 24 Wend, 587; 13 I. R., 118; 9 I. R., 174; 18 I. R., 40, 355.

Third, If the United States is not amply protected by the present exceptions in the judiciary act, Congress can at any time remedy the evil by an amendment.

Counsel enumerates a large number of States, among which are the oldest and most conservative, who have deemed it wise, just, and politic to reject this common law doctrine of prerogative, and put the sovereign on equality with the citizens as to limitations of action. The *reason and policy* of the judiciary act is to favor uniformity of law in this regard, and, in case of doubt, the *construction* should be on the side of the known reason and policy of the law.

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